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No. 388. 42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

PHILIP ELTING, Collector of Customs, Port of New York,

Petitioner,

v.

NORTH GERMAN LLOYD,

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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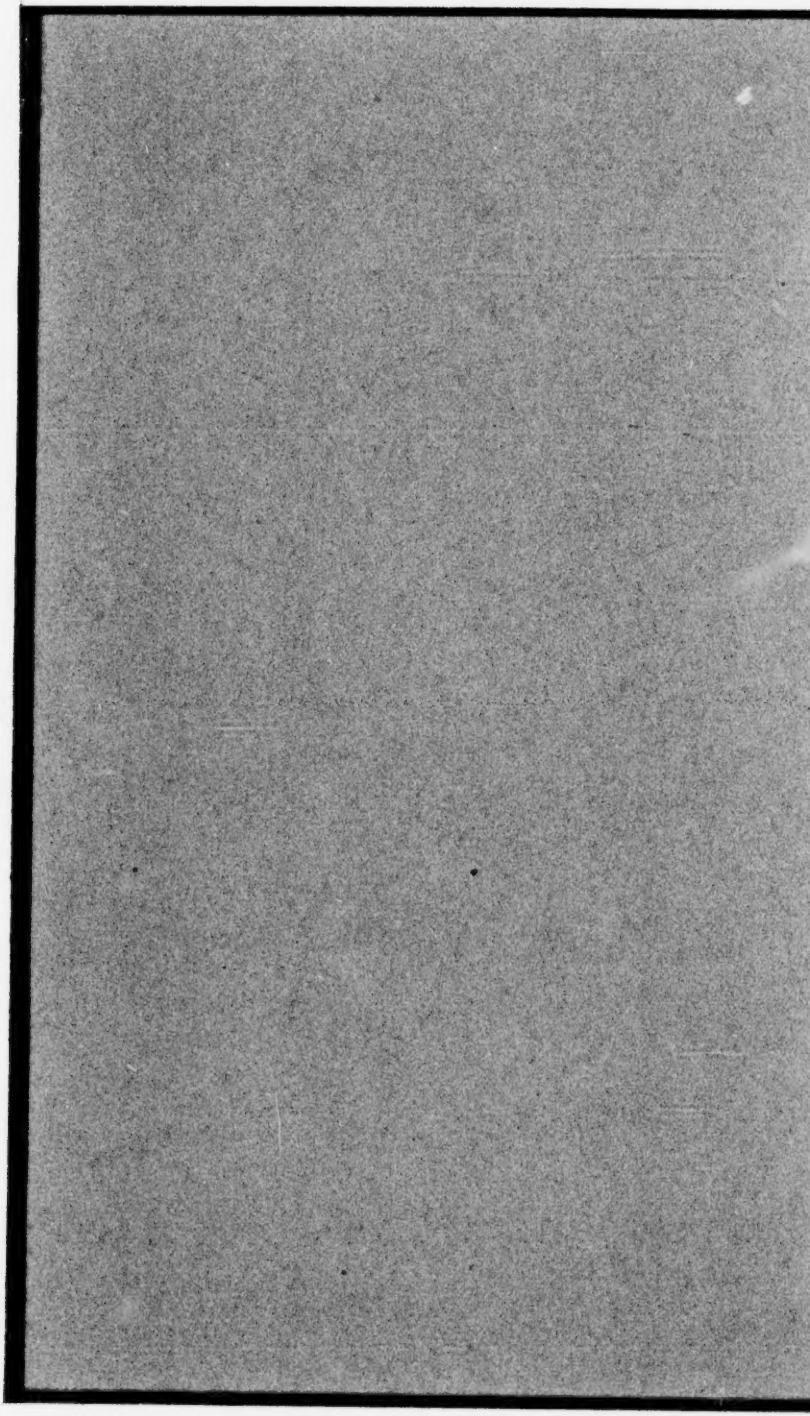

INDEX.

PAGE

The questions presented by the petitioner not involved 1

Reasons for not granting the writ 3

Conclusion 5

CITATIONS:

Cases:

Lamport & Holt v. *Elting*, 51 F. (2d) 1057..... 4

Lloyd Sabaudo v. *Elting*, 55 F. (2d) 1048..... 3

North German Lloyd v. *Elting*, 48 F. (2d) 547.. 3

Statutes:

Quota Act of May 19, 1921, c. 8 § 2, 42 Stat. 5.. 3

Act of May 11, 1922, c. 187 § 6, 42 Stat. 540.... 3

Immigration Act of 1924 (May 26, 1924), c. 190, 43 Stat. 154..... 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 885.

PHILIP ELTING, Collector of Customs, Port of New York,
Petitioner,

v.

NORTH GERMAN LLOYD.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The Questions Presented by the Petitioner.

The three questions presented by the petitioner are not the questions involved in the case at bar. We quote from the opinion of the Court below:

> "This alien was brought to the United States in accordance with section 2 (a) (4) of the above-mentioned statute (42 Stat. 5), which provides that the quota shall not apply to 'aliens visiting the United States as tourists or temporarily for business or pleasure'. It is not claimed that the plaintiff acted in bad faith in bringing the alien here. We agree that it had no right to rely upon

the visa to establish his claimed status as a quota exempt. *United States ex rel. Spinosa* v. *Curran* (D. C.), 4 F. (2d) 613, affirmed 4 F. (2d) 614 (C. C. A. 2). But the plaintiff at least had probable cause to believe that the alien belonged to one of the classes to which the quota did not apply. If his claim was well founded, he was admissible, and the only way that could be finally determined was by the alien coming to some port of entry to the United States to present his evidence of his right to enter to the officials competent to pass upon it. The statute does not forbid bringing such an alien here so that he can satisfy the proper authorities, if possible, that he has the right to enter. *Compagnie Francaise de Navigation a Vapeur* v. *Elting* (C. C. A.), 19 F. (2d) 773. The admissibility of this alien did not depend upon any exercise of discretion by the Secretary of Labor as it did in *Dollar S. S. Co.* v. *Hyde*, 23 F. (2d) 910 (C. C. A. 9), where the fine was nevertheless held to have been unlawfully imposed; or in *North German Lloyd* v. *Elting*, 48 F. (2d) 547 (C. C. A. 2), where the imposition of fines was held lawful. Funk was not in an excluded class or admissible only in the discretion of the Secretary of Labor, but was a nonquota alien if his evidence was credible and of due weight, and so entitled to be heard by the proper officials and to have all his evidence in support of his claim to entry as of right duly considered by them in fixing his status. A transportation company acting in good faith is not liable to a fine for bringing him here for such a purpose. What was said in *Compagnie Francaise, etc.*, v. *Elting, supra*, on this subject applies with equal force to this case, for his right to enter was absolute if he came here temporarily on business."

Reasons for Not Granting the Writ.

1. The determination of the instant case only affects similar cases arising under the *Quota Act* of May 19, 1921, as amended by the Act of May 11, 1922. The alien herein involved and who was in possession of a passport visa bearing the notation "purpose to proceed to the U. S. on business only within the meaning of Section 2 of the Restrictive Immigration Law (*Quota Act*)" issued on January 24, 1924, was brought to the United States by the respondent on February 14, 1924.

The Quota Act was superseded by the Immigration Act of 1924 (Approved May 26, 1924). *So that for a period of eight years the Act, which the Government now asks this Honorable Court to construe, has not been the law of the land. For eight years the Secretary of Labor has not been operating under it.*

The construction of the *Quota Act* by the Court below is not erroneous as clearly appears from the opinion quoted above.

2. The decisions of the Second Circuit with which it is claimed the decision of the Circuit Court of Appeals, Second Circuit, in the instant case is in conflict, *are all decisions dealing with an entirely different statute, to wit, the Immigration Act of 1924.*

Two of them have to do with the admission of aliens afflicted with disease and physical disability:

> *Lloyd Sabaudo* v. *Elting*, 55 Fed. (2nd) 1048;
> *North German Lloyd* v. *Elting*, 48 Fed. (2nd) 547.

They have nothing to do with the Quota Act.

In the third case and the only other one referred to, *Lamport and Holt* v. *Elting*, 51 Fed. (2nd) 1057, the District Judge in his opinion says:

> "Section 6 of the Act of 1921 (Quota Act), as added by Joint Resolution of 1922, *differs* from section 16 of the Act of 1924 (8 U. S. C. A., §216). Section 16 definitely states that it shall be unlawful to bring to the United States any immigrant who does not have an unexpired immigration visa, or any quota immigrant having a non-quota visa" (p. 1059).

That case construes the law of a later, superseding and different statute.

3. As to the importance of the question involved. The Government's petition recites:

> "There is much litigation for recovery of these fines. In the District Court for the Southern District of New York there are approximately 2,000 causes of action of this character pending, and 555 of them involve the general question in the instant case. There are many presenting the precise issue here."

This statement is certainly ambiguous and not altogether intelligible. The Government can hardly mean that 2,000 suits have been brought to recover fines imposed upon steamship companies for bringing visitors who were held inadmissible by the immigration authorities and this under *a statute which ceased to be the law in 1924*! The question of the legality of a fine imposed for bringing an alien visitor under a defunct statute is all that is involved in the case at bar.

It is scarcely the fact to speak of the "present unsettled state of the law", when not a divergent construction of the *Quota Act* is pointed out in the Second Circuit, and none is mentioned from any other Circuit.

"Hardship to transportation companies" is non-existent now so far as the Quota Act is concerned *for it has not been the law since 1924.* We concede that while it was in force, 1921-1924, their hardships were numerous.

As to the "grave difficulties" in the interpretation of the Quota Act (*which has not been upon the statute books since 1924*), presented "to the Government officers charged with the administration of the immigration laws", we say with some confidence that immigration officials are not now engaged in wrestling with the dead past.

CONCLUSION.

Wherefore it is respectfully submitted that the petition should not be granted.

April, 1932.

MELVILLE J. FRANCE,
Counsel for North German Lloyd.

RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 42.

PHILIP ELTING, Collector of Customs, Port of New York,

Petitioner,

—against—

NORTH GERMAN LLOYD,

Respondent.

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE RESPONDENT.

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INDEX.

PAGE

Opinions below 1

Statutes and regulations referred to 1

Statement 1

Summary of argument 4

Argument:

I—The fine was illegally imposed 6

II—A penal statute is involved and the respondent is not brought within both its spirit and letter .. 14

III—The question involved is the lack of jurisdiction of the Secretary of Labor, not one of an erroneous finding 14

Conclusion 15

Appendix (statutes and regulations) 17

TABLE OF CASES CITED:

Compagnie Francaise de Navigation a Vapeur v. *Elting*, 19 Fed. (2d) 773 10

Dawson v. *Shaw*, 28 Pa. Super. Ct. 563 14

Dollar S. S. Line v. *Hyde*, 23 Fed. (2d) 910 10

Field v. *United States*, 137 Fed. 6 14

Gonzales v. *Williams*, 192 U. S. 1 ..... 14, 15

Ex parte Koerner, 176 Fed. 478 14

Oceanic Nav. Co. v. *Stranahan*, 214 U. S. 321 14

PAGE

United States v. *Ju Tog*, 198 U. S. 253..... 14
United States v. *Sheldon*, 2 Wheat. 119..... 14
United States v. *Curran*, 4 Fed. (2d) 613, affirmed 4 Fed. (2nd) 614..... 8
United States v. *Commissioner*, 13 Fed. (2d) 943, 944.. 7
Ex parte Watchorn, 160 Fed. 1014, 1016.....14, 15

OTHER AUTHORITIES CITED:

Quota Act of 1921, 42 Stat. 5, as amended by Act of May 11, 1922, 42 Stat. 540....2, 4, 5, 6, 7, 8, 9, 12, 13, 17
Immigration Act of 1924, 43 Stat. 153.....4, 20
Immigation Rules of February 1, 1924.....12, 13, 22
General Instruction Consular No. 839.....11, 22
36 Cyc. 1165..... 13
36 Cyc. 1187..... 14

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NORTH GERMAN LLOYD,
Respondent,

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE RESPONDENT.

Opinions Below.

The opinion of the District Court for the Southern District of New York, granting summary judgment for the respondent, is set forth on page 15 of the Record; the opinions of the Circuit Court of Appeals on pages 19-21 of the record (54 Fed. (2d) 997).

Statutes and Regulations Referred to.

These are set forth in the appendix to this brief.

Statement.

There are no disputed questions of fact.

On the 14th day of February, 1924, the respondent brought to the United States on its Steamship "Bremen" a German alien named Joseph Funk. When Joseph Funk

arrived at the Port of New York he was detained by the immigration officials at Ellis Island. He was the holder of a German passport issued to him at Alzeman, Germany, and was the holder of a passport visa No. 96 issued to him by the Consul of the United States at Munich, Germany, dated January 24th, 1924, bearing the notation "purpose to proceed to the U. S. on business only within the meaning of Section 2 of the Restrictive Immigration Law."

Section 2 (a) (4) of the Restrictive Immigration Law (the Quota Act) of May 19, 1921, as amended May 11, 1922, provided, in part as follows:

> "That the number of aliens of any nationality who may be admitted under the immigration laws of the United States in any fiscal year shall be limited to 3 per centum of the number of foreign born persons of such nationality resident in the United States as determined by the United States census of 1910. This provision shall not apply to the following and they shall not be counted in reckoning in any of the percentage limits provided in this Act; * * * (4) aliens visiting the United States as tourists or temporarily for business or pleasure."

After examination before the Board of Special Inquiry Funk was ordered deported on the ground that he was a quota immigrant, based upon the decision that upon the facts elicited on his examination it did not appear to the immigration officials that he had come to the United States for business or pleasure. This decision seems to have been based largely upon the determination that Funk had very small funds and that it did not seem plausible that he had come to the United States for the purpose of collecting a legacy of $400.

After the decision of the Secretary of Labor that Funk

should be deported the said Secretary on August 4th, 1924, sent a notice to the respondent stating that from the ascertained facts it was indicated that a fine of $200 and the amount of the alien's passage money should be imposed upon the ground that the respondent had brought the said Joseph Funk to the United States in excess of the quota for the fiscal year beginning July 1st, 1923. (Of course, if the alien was to be included in the quota, the quota had been exhausted and therefore he was properly excluded.)

The respondent filed its protest through its attorney, with the Commissioner General of Immigration. In part, that protest said:

> "It is respectfully submitted that according to the minutes the notation on the passport in this case reads, 'Proceeds to the United States on business only, etc., and that the testimony of passengers as well as of relatives clearly indicates that the passenger would leave this country immediately after an inheritance was settled.
>
> "Attention is called to the fact that the notation made by the Consul and the statement made by the passengers before the B. S. I. justify the Department in concluding that the North German Lloyd's officials acted in good faith" (R. 25).

Notwithstanding the said protest and the facts herein, the respondent was notified by the Secretary of Labor that the said fine and refund would not be refunded and that the notation of the American Consul upon the passport visa of the said Joseph Funk "was not a guaranty of the alien's exempt status" (R. 18).

It is admitted that on January 31st, 1925, in order to secure the clearance of the Steamship "Bremen" the sum of $310, fine and refund, was paid to the defendant.

It should be added that the only appropriate immigration officers of the United States who could finally decide

and pass upon the admissibility of Joseph Funk as an alien visiting the United States temporarily for business and as coming within the provision of the law quoted above, were located and stationed in the United States.

This case arises under the Quota Act of May 19th, 1921, as amended by the Act of May 11th, 1922, which was superceded by the Immigration Act of 1924. *Neither the Immigration Act of 1917 nor the Immigration Act of 1924 are involved.*

Summary of Argument.

I.

The fine was not legally imposed. The petitioner has confused the propriety of deportation of the alien with the legality of fining the carrier for bringing. He bases the authority for his action solely upon one section (6) of the Quota Act of 1921 and ignores section 2 of the same act. The alien was brought to the United States by the respondent in accordance with section 2 (a) (4) of the Quota Act, which provides that the quota shall not apply to "aliens visiting the United States as tourists or temporarily for business or pleasure". If the alien's claim was well founded, he was admissible, and that could be only determined by the alien coming to the United States to present his evidence of his right to enter to the only officials authorized to pass upon it. The statute does not forbid bringing such an alien to the United States so that he can satisfy the proper authorities that he has that right. The right of the alien to enter was absolute if he came here temporarily on business. He was not in an excluded class but was a nonquota alien if his claim was believed and accepted by the immigration officials and so entitled to be heard by the proper officials and to have his evidence in support of his claim to entry *as of right* duly considered by

them in fixing his status. Until the alien arrived in the United States and until, by what was in effect a quasi-judicial determination, the immigration officials decided the alien was a "quota" immigrant, the penalized status did not exist. The position of the petitioner reduces substantially to the following: the government, under the statute, says, in effect, to the alien: "If you are visiting the United States for business you are exempt from the Quota Act but you must present that claim to the immigration officials in the United States who are the only persons who can pass upon it"; and to the carrier: "We will fine you if you bring the alien to the United States so that he may present his case".

II.

It is attempted to bring the respondent within a penal statute and it is elementary that to enforce a penalty against a person he must be brought clearly within both the spirit and the letter of the statute. In the instant case not only is the respondent not brought within the letter of the statute but the infliction of the penalty would clearly transgress its spirit.

III.

No question of an erroneous finding by the Secretary of Labor is involved. The question, on the contrary, upon the admitted and undisputed facts, is one of lack of jurisdiction on the part of the Secretary of Labor. Upon the admitted facts, the plaintiff was not within the prohibition of the statute. What we have in the case at bar is *not* the question of the review or of an erroneous finding, but a total lack of jurisdiction.

Argument.

I.

A fine should not be imposed and the carrier should not be penalized for bringing to the United States an alien whose admissibility could only be determined by immigration officials in the United States and who had the right to have his status as a "non quota" immigrant, if it was questioned, determined by the resident United States officials.

The question of whether or not the alien in question should have been admitted temporarily as a visitor rested entirely with the immigration authorities in this country. The Secretary of Labor might with propriety exclude the alien but he had no authority or power to fine the Line for bringing him.

The statute under which the Secretary of Labor presumed to act is the so-called Quota Act (Act of May 19, 1921, as amended May 11, 1922).

The sections of that act which are involved are set forth in the appendix hereto.

The act excluded from its operation, among others, "aliens visiting the United States as tourists or temporarily for business or pleasure", who were *not* included within the quota.

The regulations in effect at the time restated and amplified the act by excluding from its operation "aliens visiting the United States as tourists or temporarily for business or pleasure *for a period not to exceed six months*", who were *not* included within the quota. Visitors were, therefore, not quota aliens. There was no bar to their entry. Congress gave them the unqualified right to enter the United States.

It was only excess quota aliens who were barred from

entry by the Quota Act. The penalty clause of the act (Section 6), directed against the carrier—the instrumentality bringing the excess quota alien—imposed a fine for bringing an alien "not admissible under the terms of this Act or regulations made thereunder". It was for bringing an excess quota alien that a carrier was penalized. It was upon that alleged ground the respondent was fined—"for bringing to the United States the alien Joseph Funk, in excess of quota" (R. 17).

The alien here involved, claiming himself to be visiting the United States for business and so certified by the United States Consul at Munich, Germany, did not become an excess quota alien until that determination was made by the immigration authorities upon his arrival in the United States.

The validity of the claim that the alien was visiting the United States for business was one which could be only determined by the immigation officials *here,* to whom the alien had the right to present the merits of his claim. Upon any given state of facts they were the judges. Until their decision was rendered *after the arrival of the alien* his status was that of one who did not come within the provisions of the Act.

That determination of the exempt status of "visitors" can only be determined by the Immigration officials in the United States to whom the proof is to be presented, has been repeatedly affirmed.

So in *United States* v. *Commissioner,* 13 Fed. (2nd) 943, 944, the Court said:

> "The designation of these aliens as temporary visitors by the vice consul is to be regarded simply as a statement of their claim, the validity of which remained *to be determined by the immigration authorities upon their arrival in this country."*

See also *United States* v. *Curran*, 4 Fed. (2nd) 613, affirmed 4 Fed. (2nd) 614, where the Court said:

> "The statement was simply an indication by the vice consul as to the class to which relator claimed he belonged, for use of the authorities here. In other words, it was a statement of claim by relator, *the validity of which remained to be determined upon his arrival.*"

The Act, therefore, makes it unlawful to bring to the United States any alien after the quota of his nationality has been admitted except that aliens visiting the United States temporarily for business shall not be counted in the quota.

It follows that a temporary visitor is not a quota immigrant and is, therefore, not an excess quota immigrant for bringing whom the carrier is subject to fine. Section 6 of the Quota Act in the language "any alien not admissible under the terms of this Act" must mean an excess quota immigrant, not an alien who is in a class which is excluded from the Act.

Who can and must determine this latter fact? Only the immigration officials in the United States to whom the alien in question certainly has the right to present the merits of his claim. We say "certainly" advisedly. Otherwise the carrier is privileged to bring only such aliens as *it* thinks ought to be admitted and the alien never has the opportunity to submit his claim to those who alone have the right to pass upon it.

To adopt the petitioner's contention, that the carrier *acts at its risk,* leads to the following anomalous and impossible situations:

The carrier would be required to be the judge (Sec. 2 [a] Quota Act) of the admissibility of following:

(1) *Aliens who are Government officials, their families, attendants, servants and employees.*

(2) Aliens in continuous transit through the United States.

(4) *All alien tourists.*

(5) Aliens from countries immigration from which is regulated in accordance with treaties or agreements relating solely to immigration.

(8) *Aliens under the age of eighteen who are children of citizens of the United States.*

The above are all in the same category as aliens visiting for business.

To hold that the carrier must investigate the merits of the claims of aliens in the foregoing classes and at its peril transport them, transcends the purpose and spirit of the statute and is not in accordance with its letter.

Determination of whether an alien's purpose or intention is to visit the United States for business is after all a determination of a mental purpose or intention and that in the final analysis, no matter what the United States Consul may say, no matter what the alien may say, is and can only be determined by the immigration officials to whom he is entitled to present his proof after his arrival in the United States.

Until the alien arrived in the United States and until, by what in effect was a quasi judicial determination, the immigration officials decided the alien was a "quota" immigrant, the penalized status did not exist.

Under the Quota Act, a "visitor" was not included among "quota" immigrants. The American Consul in the instant case certified that the alien was a "visitor". The alien remained in that class or at least he was not a "quota" immigrant until that determination was made by the immigration authorities here to whom he must present his proof and who alone could pass upon it.

The determination of the question of "status" was hidden in the minds of the proper immigration officials in New York and only became a matter of knowledge and legal fact when these officials had acted here in the United States and *after* the arrival of the alien in the United States and the presentation of his case to them. Knowledge on the part of the respondent shipowner could not exist until the immigration officials at New York had spoken *after* the alien had been brought under the direct authority of the Secretary of Labor.

The ruling which is here urged has the support of every Circuit Court of Appeals which has been called to pass upon it.

As was said in the case of *Compagnie Francaise de Navigation a Vapeur* v. *Elting,* 19 Fed. Rep. (2d) 773:

> "To hold that the transportation company acts at its peril in bringing an alien who claims to be exempt from the quota would be a practical denial to the alien of the privilege of presenting his evidence. No company would bring him on such terms. To hold that the company must investigate the merits of the alien's claim, and is privileged to bring only such aliens as it thinks ought to be admitted, is to make it, rather than the immigration officials, pass upon the alien's claim—which is not the privilege granted the alien by the regulation."

And again as was said by the Court in *Dollar S. S. Line* v. *Hyde,* 23 Fed. Rep. (2d) 910:

> "What action the secretary would probably take in the case of a domiciled alien afflicted with a contagious disease is an immaterial consideration; we are concerned only with the extent of his power, and not with the considerations which may weigh with him in the exercise of his discretion. It would seem

to follow that, if the secretary has such power, the alien must be permitted to invoke the exercise thereof by presenting himself at a port of entry, and hence a carrier cannot be penalized for transporting him for that purpose. *Compagnie Francaise, etc.* v. *Elting* (C. C. A.), 19 F. (2d) 773."

The Consular General Instructions, No. 839, July 14, 1922 (in effect until June 12, 1924), confirm the interpretation which is here urged.

A co-ordinate Department of the Federal Government, the Department of State, charged with co-operating with the Department of Labor, in the enforcement of the statute involved, gave to it the same construction which the court below gave.

We quote from the official consular instructions:

"Consular officers are, however, not authorized to assume abroad the functions vested by law in the immigration officers of the United States of deciding upon the admissibility of aliens after arrival at an American port."

"If an alien, after submitting to a consular officer the alien's declaration on Form 228, appears in the consul's judgment to fall clearly under one of the classes liable to exclusion, the consul shall so advise the alien, informing him of the serious risk he is taking in attempting to enter the United States and acquainting him with the probability that he will be excluded from the United States and deported. If the alien nevertheless insists upon proceeding, the consular officer shall visa his passport if it is valid, and there is no other reason for refusal."

It becomes quite apparent from a reading of these instructions:

1. That the determination of admissibility (whether

or not the alien is or is not a "visitor") can only be decided by the immigration officials in the United States.

2. But because of the right which the alien has of having his status determined by the immigration officers in the United States, the consular officer, even though in his judgment the alien will fail in his claim, nevertheless is required to visa the alien's passport, *so that the alien may proceed to the United States and have his claim passed upon by the only body which can do so.*

We have as a result one department of government recognizing the fact that it must give the alien an opportunity of presenting his claim to the officials of the immigration bureau in the United States, and a coordinate department urging that a person who provides the facilities which will enable an alien to do the same thing, shall be penalized.

We submit that it borders upon absurdity—certainly it is the height of injustice—for the government, which is seeking to enforce a penal statute, to say in effect (to the alien): "You may present your case in the United States" and (to the carrier): "We will fine you if you bring that alien to the United States so that he may present his case."

As has already been stated we are dealing with a statute which has not been the law since 1924. We parallel the two clauses dealing with the subject of penalty, as found in the Quota Act and the superceding Immigration Act of 1924:

Quota Act.	Immigration Act 1924.
"Sec. 6. That it shall be unlawful for any person, including any transportation company other than railway lines entering the United	"Sec. 16(a). It shall be unlawful for any person, including any transportation company, or the owner, master, agent, charterer or con-

States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel to bring to the United States either from a foreign country or any insular possession of the United States any alien not admissible under the terms of this Act or regulations made thereunder.

signee of any vessel, to bring to the United States by water from any place outside thereof (other than foreign contiguous territory) (1) any immigrant who does not have an unexpired immigration visa, or (2) any quota immigrant having an immigration visa the visa in which specifies him as a non-quota immigrant."

The petitioner's brief endeavors to give the old Quota Act section the same construction that the present Immigration Act of 1924 section carries. It is submitted that the contention is unsound. It will always be presumed that the legislature, in adopting the amendment, intended to make some change in the existing law.

36 Cyc. 1165.

In the present instance there is no need of presumption; the change stands out distinctly.

Petitioner's argument *in terrorem* that affirmance herein leaves the field open for any alien, no matter how doubtful his chances of admission, to present his claim to officials in this country, is, to say the least, far fetched. *The Quota Act, with which we are alone concerned, has not been the law since 1924. No alien since that date has come under its provisions. No alien hereafter ever will.*

Since 1924 every immigrant's rights and every carrier's rights have been determined by the Immigration Act of 1924, which provides an entirely new and different plan of admittance and definition.

II.

It is attempted to bring the respondent within a penal statute and it is fundamental that to enforce a penalty against a person, he must be brought clearly within both the spirit and the letter of the statute.

36 Cyc. 1187;
United States v. *Sheldon,* 2 Wheat. 119;
Field v. *United States,* 137 Fed. Rep. 6;
Dawson v. *Shaw,* 28 Pa. Super. Ct. 563.

In the instant case not only is the respondent not brought clearly within the letter of the statute but the infliction of the penalty would clearly transgress the spirit of the statute.

III.

No question is involved of an erroneous finding; the question is one of lack of jurisdiction on the part of the Secretary of Labor. Upon the admitted facts, the plaintiff was not within the prohibition of the statute.

"While the courts are bound by findings duly made by the executive branch in matters of this kind (citing *U. S.* v. *Ju Toy,* 198 U. S. 253; *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 321), they cannot properly refuse relief where upon the admitted facts it appears as a matter of law, that the person sought to be deported is not within the inhibition of the statute."

Gonzales v. *Williams,* 192 U. S. 1;
Ex parte Watchhorn, 160 Fed. 1014;
Ex parte Koerner, 176 Fed. 478, 479.

"Doubtless the determination of the immigration authorities upon all questions of fact, even if made upon legally incompetent or inconclusive evidence is final, but when the proceedings, before them snow undisputably that they are acting without jurisdiction, relief may be had."

Ex parte Watchorn, 160 Fed. 1014, 1016;
See *Gonzales* v. *Williams,* 192 U. S. 1.

What we have in the case at bar is *not* the question of the review or an erroneous finding, but a total lack of jurisdiction. The facts upon which the Secretary of Labor was authorized to act, were completely absent.

CONCLUSION.

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

MELVILLE J. FRANCE,
Counsel for Respondent.

October, 1932.

Appendix.

STATUTES AND REGULATIONS.

THE QUOTA ACT.

(Act of May 19, 1921, as amended May 11, 1922.)

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the operation of the act entitled "An act to limit the immigration of aliens into the United States," approved May 19, 1921, is extended to and including June 30, 1924.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * * *

Sec. 2. (a) That the number of aliens of any nationality who may be admitted under the immigration laws to the United States in any fiscal year shall be limited to 3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910. *This provision shall not apply to* the following, and they shall not be counted in reckoning any of the percentage limits provided in this act: (1) Government officials, their families, attendants, servants, and employees; (2) aliens in continuous transit through the United States; (3) aliens lawfully admitted to the United States who later go in transit from one part of the United States to another through foreign contiguous territory; (4) *aliens visiting the United States as tourists or temporarily for business or pleasure;* (5) aliens from countries immigration from which is regulated in accordance with treaties or agreements relating solely to immigration; (6) aliens from the so-called Asiatic barred zone, as described in section 3 of the immigration act;

(7) aliens who have resided continuously for at least five years immediately preceding the time of their application for admission to the United States in the Dominion of Canada, Newfoundland, the Republic of Cuba, the Republic of Mexico, countries of Central and South America, or adjacent islands; or (8) aliens under the age of eighteen who are children of citizens of the United States.

(b) For the purposes of this act nationality shall be determined by country of birth, treating as separate countries the colonies or dependencies for which separate enumeration was made in the United States census of 1910.

(c) The Secretary of State, the Secretary of Commerce, and the Secretary of Labor, jointly, shall, as soon as feasible after the enactment of this act, prepare a statement showing the number of persons of the various nationalities resident in the United States as determined by the United States census of 1910, which statement shall be the population basis for the purposes of this act. In case of changes in political boundaries in foreign countries occurring subsequent to 1910 and resulting (1) in the creation of new countries, the Governments of which are recognized by the United States, or (2) in the transfer of territory from one country to another, such transfer being recognized by the United States, such officials, jointly, shall estimate the number of persons resident in the United States in 1910 who were born within the area included in such new countries or in such territory so transferred, and revise the population basis as to each country involved in such change of political boundary. For the purpose of such revision and for the purposes of this act generally aliens born in the area included in any such new country shall be considered as having been born in such country, and aliens born in any territory so transferred shall be considered as having been born in the country to which such territory was transferred.

(d) When the maximum number of aliens of any nationality who may be admitted in any fiscal year under this act shall have been admitted all other aliens of such nationality, except as otherwise provided in this act, who may apply for admission during the same fiscal year shall be excluded: Provided, That the number of aliens of any nationality who may be admitted in any month shall not exceed 20 per centum of the total number of aliens of such nationality who are admissible in that fiscal year; Provided further, That aliens returning from a temporary visit abroad, aliens who are professional actors, artists, lecturers, singers, nurses, ministers of any religious denomination, professors for colleges or seminaries, aliens belonging to any recognized learned profession, or aliens employed as domestic servants, may, if otherwise admissible, be admitted notwithstanding the maximum number of aliens of the same nationality admissible in the same month or fiscal year, as the case may be, shall have entered the United States; but aliens of the classes included in this proviso who enter the United States before such maximum number shall have entered shall (unless excluded by subdivision (a) from being counted) be counted in reckoning the percentage limits provided in this act; Provided further, That in the enforcement of this act preference shall be given so far as possible to the wives, parents, brothers, sisters, children under eighteen years of age, and fiancees, (1) of citizens of the United States, (2) of aliens now in the United States who have applied for citizenship in the manner provided by law, or (3) of persons eligible to United States citizenship who served in the military or naval forces of the United States at any time between April 6, 1917, and November 11, 1918, both dates inclusive, and have been separated from such forces under honorable conditions.

Sec. 6. That it shall be unlawful for any person, including any transportation company other than railway

lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel, to bring to the United States either from a foreign country or any insular possession of the United States any alien not admissible under the terms of this act or regulations made thereunder, and if it appears to the satisfaction of the Secretary of Labor that any alien has been so brought, such person or transportation company, or the master, agent, owner, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $200 for each alien so brought, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, such latter sum to be delivered by the collector of customs to the alien on whose account assessed. No vessel shall be granted clearance papers pending the determination of the liability to the payment of such fine, or while the fine remains unpaid; except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine. Such fine shall not be remitted or refunded unless it appears to the satisfaction of the Secretary of Labor that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such person, or the owner, master, agent, or consignee of the vessel, prior to the departure of the vessel from the last seaport in a foreign country or insular possession of the United States.

Approved May 19, 1921, as amended by Public Resolution No. 55, approved May 11, 1922.

The Immigration Act of 1924, 43 Stat. 153 (U. S. C. Title 8, Sec. 216), Section 16:

> SEC. 16. (a) It shall be unlawful for any person, including any transportation company, or the owner, master, agent, charterer, or consignee

of any vessel, to bring to the United States by water from any place outside thereof (other than foreign contiguous territory) (1) any immigrant who does not have an unexpired immigration visa, or (2) any quota immigrant having an immigration visa the visa in which specifies him as a non-quota immigrant.

(b) If it appears to the satisfaction of the Secretary of Labor that any immigrant has been so brought, such person, or transportation company, or the master, agent, owner, charterer, or consignee of any such vessel shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each immigrant so brought, and in addition a sum equal to that paid by such immigrant for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, such latter sum to be delivered by the collector of customs to the immigrant on whose account assessed. No vessel shall be granted clearance pending the determination of the liability to the payment of such sums, or while such sums remain unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of an amount sufficient to cover such sums, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

(c) Such sums shall not be remitted or refunded, unless it appears to the satisfaction of the Secretary of Labor that such person, and the owner, master, agent, charterer, and consignee of the vessel, prior to the departure of the vessel from the last port outside the United States, did not know, and could not have ascertained by the exercise of reasonable diligence, (1) that the individual transported was an immigrant, if the fine was imposed for bringing an immigrant without an unexpired immigration visa, or (2) that the individual transported was a

quota immigrant, if the fine was imposed for bringing a quota immigrant the visa in whose immigration visa specified him as being a non-quota immigrant.

Immigration Rules of February 1, 1924:

Rule 9, subdivision E.—Aliens visiting the United States as tourists or temporarily for business or pleasure for a period not to exceed six months shall not be subject to the provisions of section 2 (a) of said Act of May, 1921, as amended, nor shall they be counted in reckoning any of the percentage limitations provided in said act.

General Instruction Consular, No. 839, issued by the Secretary of State on July 14, 1922, and in effect until June 12, 1924, provided in part:

SEC. 12. * * *. In the work of alien visa control it is the desire of the Department that consular officers shall be of the greatest possible assistance to the Bureau of Immigration, Department of Labor. Consular officers are, however, not authorized to assume abroad the functions vested by law in the immigration officers of the United States of deciding upon the admissibility of aliens after arrival at an American port.

Nevertheless, in order to prevent or avoid so far as possible hardships and dangers involved in deportation under present conditions, the consular officer to whom a passport is presented for visa shall endeavor to ascertain as far as practicable whether the holder is a member of any of the classes excluded from the United States by the provisions of section 3 of the immigration act of February 5, 1917. If an alien, after submitting to a consular officer the alien's declaration on Form 228, appears in the consul's judgment to fall clearly under one of the

classes liable to exclusion, the consul shall so advise the alien, informing him of the serious risk he is taking in attempting to enter the United States and acquainting him with the probability that he will be excluded from the United States and deported. If the alien nevertheless insists upon proceeding, the consular officer shall visa his passport if it is valid, and if there is no other reason for refusal.

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